No. 12-10

IN THE

Supreme Court of the United States

APR 2 - 2013

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

—v.—

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Arthur N. Eisenberg
Counsel of Record
Mariko Hirose
New York Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3300
aeisenberg@nyclu.org

Steven R. Shapiro
Mie Lewis
Lenora M. Lapidus
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

THE ANTI-PROSTITUTION PLEDGE VIOLATES FREEDOM OF BELIEF BY IMPOSING THE EQUIVALENT OF A LOYALTY OATH 6

A. The First Amendment Prohibits The Government From Imposing A System Of Ideological Conformity 6

B. The Government May Not Use Its Spending Power To Impose Ideological Oaths 13

C. This Is Not A Case About Government Speech.....17

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

American Communications Association v. Douds, 339 U.S. 382 (1950) 10

Baird v. State Bar of Arizona, 401 U.S. 1 (1971)..... 14

Bd. of Educ. of Westside Comty. Sch. v. Mergens, 496 U.S. 226 (1990) 19

Bond v. Floyd, 385 U.S. 116 (1966)..... 11

Choose Life of Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008) 19

Cole v. Richardson, 405 U.S. 676 (1972)..... 10, 11

Connell v. Higginbotham, 403 U.S. 207 (1971) 11, 12, 14

Elfbrandt v. Russell, 384 U.S. 11 (1966)..... 9

Elrod v. Burns, 427 U.S. 347 (1976) 7, 14

F.C.C. v. League of Women Voters, 468 U.S. 364 (1984) 15, 16

Florida Star v. B.J.F., 491 U.S. 524 (1989) 18

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 18

Hosack v. Smiley, 390 U.S. 744 (1968)..... 10

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 19, 20

Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) 9, 14

Knight v. Bd. of Regents, 390 U.S. 36 (1968) 10

Nurre v. Whitehead, 130 S. Ct. 1937 (2010) 20

Ohlson v. Phillips, 397 U.S. 317 (1970) 10

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 13

Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009) 19

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 15, 16

Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009) 19

Rosenberger v. Rector of and Visitors of the University of Virginia, 515 U.S. 819 (1995) 13, 18

Rust v. Sullivan, 500 U.S. 173 (1991) .....*passim*

Speiser v. Randall, 357 U.S. 513 (1958) 8, 10

United States v. Brown, 381 U.S. 437 (1965)..... 10

United States v. Harriss, 347 U.S. 612 (1954)..... 15

United States v. Robel, 389 U.S. 258 (1967) 14

United States v. Rumley, 345 U.S. 41 (1953)..... 15

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 7, 8

Whitehall v. Elkins, 389 U.S. 54 (1967) 9

Whitney v. California, 274 U.S. 357 (1927) 1, 6

Wooley v. Maynard, 430 U.S. 705 (1977) 8, 12

CONSTITUION & STATUTES

U.S. Const. amend. I.....*passim*

U.S. Const. Art. II, § 1, cl. 7..... 9

U.S. Const. Art. VI, cl. 3 9

United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7601 *et seq* ..... *passim*

22 U.S.C. § 7603(4) 1

22 U.S.C. § 7631(e) 1

22 U.S.C. § 7631(f) ..... *passim*

26 U.S.C. § 501 (c)(4) 15

OTHER AUTHORITIES

Mission & Values, Open Society Foundations, http://www.opensocietyfoundtions.org/about/mission-values 2

Mission & Vision, Pathfinder International, http:// www.pathfinder.org/about-us/mission/ 2

INTRODUCTION AND INTEREST OF *AMICI*[1]

The "freedom to think as [one] will and to speak as [one] think[s]" embraces the central promise of the First Amendment. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Yet, a provision of the Leadership Act, at the heart of this case, tells recipients of federal funding what they must think about prostitution.

Congress enacted the Leadership Act in 2003, to combat three significant international public health problems: HIV/AIDS, tuberculosis, and malaria.[2] The statute funds a wide range of public health initiatives, such as the development of vaccines and treatment protocols. It also seeks to encourage a broad range of non-Governmental Organizations (NGOs) to join in this effort either individually or in conjunction with governmental agencies. 22 U.S.C. § 7603(4).

The statute, which is directed at public health measures and treatment protocols, includes a provision specifying that none of the funds made available may be used "to promote or advocate the legalization or practice of prostitution . . . ." 22 U.S.C. § 7631(e). That section of the statute has not been challenged in this case.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. None of the parties or their counsel authored this brief in whole or in part, and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

[2] United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7601 *et seq.*

The section of the Act that has been challenged in this case reaches far beyond the federally funded speech of grant recipients. Specifically, § 7631(f) mandates that "no funds made available to carry out [the] Act . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution . . . ." This requirement does "not apply to the Global Fund to Fight AIDs, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." *Id.* All other grant recipients, including Respondents, must either comply with the Anti-Prostitution Pledge or forego participation in programs under the Leadership Act.[3]

The international public health community remains divided over the question of how best to work with those engaged in prostitution and how to address prostitution in the fight against HIV/AIDS. The Leadership Act nonetheless compels those participating in its programs (except the exempted groups) to affirm their ideological commitment to the government's prescribed view, even if their government-funded projects have nothing to do with the commercial sex trade. The statute thus deeply implicates the First Amendment right "to think as [one] will and to speak as [one] think[s]."

---

[3] Respondents in this case are organizations whose mission statements clearly reflect their organizational values. *See, e.g.*, Mission & Vision, Pathfinder International, http://www.pathfinder.org/about-us/mission/; Mission & Values, Open Society Foundations, http://www.opensocietyfoundtions.org/about/mission-values.

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. Both organizations have long been devoted to the protection and enhancement of fundamental rights. Among the most fundamental of rights are the rights of expression and personal belief secured by the First Amendment. Accordingly, the ACLU and NYCLU respectfully submit this brief to address the significant First Amendment issues raised by this controversy.

SUMMARY OF ARGUMENT

The congressional enactment at issue in this case seeks to use the power of the purse to require recipients of public health funding to subscribe to the government's own ideological position on prostitution, and to affirm their allegiance to the government's position by submitting a pledge of support to the government. The challenged provision violates core First Amendment principles that prohibit the government from compelling private belief.

Petitioners seek to avoid the force of this First Amendment prohibition by advancing two principal arguments. First, they assert that the obligation imposed by the Anti-Prostitution Pledge is permissible under the Spending Clause of the Constitution and that public health organizations that object to the Anti-Prostitution Pledge can either decline government funding or establish affiliated

organizations that are free to say what they want with their own money. Alternatively, Petitioners assert that this case presents an example of the government enlisting recipients of funding to convey the government's own message. Accordingly, Petitioners argue that this case involves the "government as speaker" rather than the government as the regulator of private speech and belief. Neither of these arguments avoids the constitutional problems inherent in the statute.

The government's affiliation argument might have more force (depending on the nature of the affiliation requirements) if this case involved a challenge to the provision of the Act providing that government funds cannot be used "to promote or advocate the legalization of prostitution." It does not. The Anti-Prostitution Pledge being challenged in this case amounts, in effect, to a loyalty oath. Unlike the loyalty oaths of the past, however, the Anti-Prostitution Pledge does not command loyalty to the nation; instead, it commands fealty to the government's policy positions. In doing so, it does not dictate the terms of public discourse but the content of private belief. The fact that the grant recipient may be allowed to speak out of the other side of its mouth through an affiliated organization that is not receiving government funds does not redress the constitutional injury caused by the government's effort at thought control. At best, it invites hypocrisy.

The government's effort to justify its Anti-Prostitution Pledge by invoking the government speech doctrine is equally flawed. The government acknowledges that § 7631(f) merely requires grantees to have a policy opposing prostitution. Pet. Br. At 27.

For most grant recipients, including Respondents, that is the end of the matter. They are not required to convey the government-imposed message on prostitution to anyone but the government. Accordingly, they cannot be described as government messengers without distorting that concept beyond all recognition. And, the government's claim that the Anti-Prostitution Pledge is necessary to ensure that the government's goals will be pursued with "consistency, force, and scope," *id.* at 28, is fatally undermined by the fact that major grant recipients are exempted from the Pledge requirement.

In short, the Anti-Prostitution Pledge has less to do with government messaging than ideological conformity. That is not a price that the government may exact, even when the government is administering a grant program. To be sure, the government may require grant recipients to spend government funds for their intended purposes. Thus, the government has the right to monitor the activities of government grantees to ensure their compliance with grant conditions. Under certain circumstances, the government can also regulate government funded speech, most obviously when private parties are hired to serve as government spokespeople. But any attempt by the government to dictate the thoughts or beliefs even of those it is funding crosses a critical constitutional line. For that reason alone, the Anti-Prostitution Pledge cannot be sustained and the decision below must be affirmed.

ARGUMENT

THE ANTI-PROSTITUTION PLEDGE VIOLATES FREEDOM OF BELIEF BY IMPOSING THE EQUIVALENT OF A LOYALTY OATH

A. The First Amendment Prohibits The Government From Imposing A System Of Ideological Conformity

The constitutional injury at issue here involves more than a limitation on the right to speak. The Anti-Prostitution Pledge tells funding recipients what they must think. It, therefore, compromises "[one's] freedom to think as [one] will." *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). By compelling recipients of funding to sacrifice their ideological autonomy and integrity, it violates the First Amendment.

The Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), is instructive in this regard. In upholding the funding restrictions at issue in *Rust*, the Court was careful to note that, although individuals carrying out a Title X project "must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral," the regulations "govern solely the scope of the Title X project's activities [and] do not in any way restrict the activities of those persons acting as private individuals." *Id.* at 198-99. When asked about abortion or other matters that were beyond the scope of the Title X project, "[n]othing in [the Title X regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200.

The Anti-Prostitution Pledge does precisely that. In order to participate in the program to treat

HIV/AIDS, tuberculosis, and malaria, grant recipients must adopt as their own a government-mandated position regarding prostitution that they might not in fact hold or wish to express. The Anti-Prostitution Pledge thus intrudes into private belief and ideological conviction in ways that were not at issue in *Rust*.

The Anti-Prostitution Pledge does, however, resemble the pledges and oaths that this Court has repeatedly found impermissible because they impose an orthodoxy of belief. Most famously, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court invalidated the requirement that students pledge allegiance to the flag. Writing for the Court, Justice Jackson characterized the compulsory flag salute and pledge as an "affirmation of a belief," *id.* at 633, and observed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. The Court concluded that the very purpose of the First Amendment is to preserve this "sphere of intellect and spirit" from "all official control." *Id.*

Since *Barnette*, this Court has continued to recognize that the right to hold one's personal "beliefs and to associate with others of [like-minded] political persuasion" lies at the core of the First Amendment. *Elrod v. Burns*, 427 U.S. 347, 356 (1976). In *Elrod*, for example, the Court upheld a claim that the termination of public employees on the basis of party affiliation was impermissible under the

First Amendment. And, in *Speiser v. Randall*, 357 U.S. 513, 514-15 (1958), the Court invalidated a requirement that veterans applying for a property tax exemption subscribe to an oath disavowing the overthrow of the government and any support of foreign governments hostile to the United States. Concurring in *Speiser*, Justice Douglas wrote: "I know of no power that enables any government under our Constitution to become the monitor of thought." *Id.* at 538 (Douglas, J., concurring). *See also Wooley v. Maynard*, 430 U.S. 705, 707, 714 (1977) (invalidating criminal sanctions for concealing state motto on vehicle license plates in recognition of "a broader concept of 'individual freedom of mind,'" of which the speech right is a component (citation omitted)).

Efforts by the government to become a "monitor of thought" are anathema to a democratic society: they erode individual dignity, they compromise the integrity of ideological principles held by issue-oriented organizations, and they limit public debate. This case illustrates the problem. The Anti-Prostitution Pledge inevitably forces grantees who do not agree with the government's position on prostitution (or who may have no position on the issue at all), into an unconstitutional dilemma: by submitting to the Pledge they must either "forego any contrary convictions of their own" and "become unwilling converts" to government orthodoxy, or "simulate assent by words without belief and by a gesture barren of meaning." *Barnette*, 319 U.S. at 633. The lesson of history, which is well worth heeding, is that "all attempts to influence (the mind) by temporal punishment, or bur[d]ens, or by civil incapacitations, tend only to beget habits of

hypocrisy and meanness . . . ." *Id.* at 646 (citation omitted) (Murphy, J., concurring).

This Court's cases identify several hallmarks of a prohibited loyalty oath, all of which are present in this case. The Anti-Prostitution Pledge requires citizens to affirm their allegiance to a government-prescribed view; it imposes concrete obligations; and it is centrally concerned with ideology. Because it is a mandatory statement of ideological conformity, the Anti-Prostitution Pledge oversteps the clear boundaries of the First Amendment.

1. The Anti-Prostitution Pledge requires grantees to submit to the government a written expression of loyalty to the government's own ideological position. 22 U.S.C. § 7631(f); JA 114 ¶¶5, 7. This Court has long and properly recognized that such government-induced oaths threaten core First Amendment values. *See, e.g., Whitehall v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

The explanation for those holdings is both simple and fundamental. Our constitutional system rests on the premise that the just powers of the government are derived from the consent of the governed, but that premise is undermined if the people's consent is coerced.

This Court has also recognized that a different calculus applies to the ceremonial oaths administered to government officials. As an initial matter, of course, the Constitution itself refers to such oaths. *See* U.S. Const. Art. II, § 1, cl. 7 (presidential oath); U.S. Const. Art. VI, cl. 3 (oath for

federal elected officials and civil servants). But, just as importantly, such oaths are designed to "assure that those in positions of public trust [are] willing to commit themselves to live by the constitutional processes of our system."[4] *Cole v. Richardson*, 405 U.S. 676, 684 (1972).

Thus, this Court has been careful to distinguish between oaths that bind government officials to respect the Constitution, and oaths that bind private citizens to accept the government's ideology. The Anti-Prostitution Pledge falls into the latter category. As Justice Douglas observed in *Speiser*, "When we allow government to probe [one's] beliefs and withhold . . . some of the privileges of citizenship because of what [one] thinks, we do indeed 'invert the order of things,' to use Hamilton's phrase." 357 U.S. at 536 (Douglas, J., concurring) (citation omitted).

---

[4] Several *per curiam* decisions by the Court almost fifty years ago relied on similar reasoning to uphold a series of loyalty oaths for teachers. *Ohlson v. Phillips*, 397 U.S. 317 (1970) (*per curiam*); *Hosack v. Smiley*, 390 U.S. 744 (1968) (*per curiam*); *Knight v. Bd. of Regents*, 390 U.S. 36 (1968) (*per curiam*). Those decisions have not been revisited since. In addition, the Court sustained a form of loyalty oath for organized labor leaders in *American Communications Association v. Douds*, 339 U.S. 382 (1950), but that Cold War ruling does not support the government's position in this case. First, the holding in *Douds* rested on the government's asserted interest in protecting against "obstructive strikes . . . designed to serve ultimate revolutionary goals." *Id.* at 388. That interest obviously has no relevance here. Second, the precedential value of *Douds* was severely undermined by this Court's subsequent decision in *United States v. Brown*, 381 U.S. 437 (1965). Third, even *Douds* recognized that political beliefs and affiliations are ordinarily impermissible subjects of government action. 339 U.S. at 391.

2. The Anti-Prostitution Pledge also imposes a twin set of onerous and specific obligations on the grantees that sign it. First, it requires grantees to embrace a specific ideological position on an issue that is the subject of considerable public debate, that may have nothing to do with the actual tasks that they have agreed to undertake in exchange for the government grant, and that may be contrary to an ideological position that the grantee has previously held. Second, because the Anti-Prostitution Pledge is a condition of the grant, it invites government monitoring of a grantee's words and actions to ensure compliance with the Pledge, even assuming that those words and actions are unrelated to the government-funded project that the grant was intended to support. It is clear from the record that grantees fully understand both the obligations that flow from signing the Pledge and the penalties they risk by violating it. JA 151 ¶ 20, 126 ¶¶ 21-22.

In this way, as well, the difference is stark between the Anti-Prostitution Pledge and a traditional oath of office. *See Bond v. Floyd*, 385 U.S. 116, 135 (1966); *Cole*, 405 U.S. at 685-86. The Pledge is not an aspirational statement. It seeks to compel orthodoxy through compelled statement of belief enforced by the threat of serious financial sanctions for any deviation from the government's prescribed view.

3. Most fundamentally, the Anti-Prostitution Pledge is ideological by its very nature. By contrast, forward-looking promissory oaths by public officers do not constrain the beliefs of public officeholders but place ideologically neutral parameters on their official actions. *Connell v. Higginbotham*, 403 U.S.

207, 209 (1971) (Marshall, J., concurring in the result). Similarly, state requirements that certain documents bear official seals or stamps containing a specified symbol or motto are acceptable because the purpose of such a mark is ideologically neutral, namely, providing verification of the document's origin. *Wooley*, 430 U.S. at 715 n.11. Likewise, in *Rust*, the funding conditions attached to the Title X family planning program aimed "to ensure that the limits of the federal program [were] observed," and in particular to limit the program to pre- as opposed to post-conception family planning. 500 U.S. at 193. This pragmatic purpose was reasonably carried out through restrictions on the speech of program participants because the funded activity itself consisted in part of speech, namely, the provision of medical counseling and referrals concerning family planning.

While oaths and pledges consisting of forward-looking promises serving practical ends may be permissible, "belief as such cannot be the predicate of governmental action." *Connell*, 403 U.S. at 210 (Marshall, J., concurring in the result). The government may not put citizens in the position of actually or apparently "asserting as true" the government's point of view. *Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting). That is precisely the case here where grantees must state, not that the government disapproves of prostitution, but that the organization itself does. The Pledge thus excludes those with opposing views (or no view at all) from funding eligibility, regardless of whether disagreement over prostitution would in any way have affected funded activities.

B. The Government May Not Use Its Spending Power To Impose Ideological Oaths

The First Amendment prohibits government from regulating expressive activities on the basis of viewpoint discrimination. In *Rosenberger v. Rector of and Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court recognized that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 828-29 (internal citation omitted). In this case, the Anti-Prostitution Pledge clearly regulates the expression of funding recipients on the basis of viewpoint. By its terms, the provision requires recipients of funding to espouse a narrow point of view prescribed by the government on prostitution. Resp. Br. at 29-34.

Application of the First Amendment prohibition against viewpoint discrimination to the statutory provision at issue here would require that the government demonstrate that the statutory regime is narrowly tailored to the advancement of a compelling interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983). Petitioners never even seek to satisfy this standard.

They argue, instead, that the First Amendment prohibition against viewpoint discrimination is inapplicable because the funding conditions imposed by the statute constitute a permissible "exercise of Congress's authority under

the Spending Clause." Pet. Br. at 16. But, where the core freedom of belief is concerned, it is immaterial whether the pressure to conform is applied directly or indirectly. Because freedom of political belief lies at the heart of the First Amendment, government may not burden that freedom, "[r]egardless of the nature of the inducement." *Elrod*, 427 U.S. at 356. Indeed, most cases in which a loyalty oath was invalidated involved employment, which the applicant in theory remained free to take or leave. *See, e.g., id.* at 347; *Connell*, 403 U.S. 207; *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian*, 385 U.S. 589.

It is thus irrelevant that what is at stake in the instant case is eligibility for government funding. Although, in theory, potential grantees remain free to "walk away" from the disease -prevention funding distributed under the Leadership Act, the very existence of an incentive to forfeit one's freedom of belief is itself unconstitutional. In fact, an essential characteristic of impermissible loyalty oaths is precisely their self-executing character, where the would-be recipient of a governmental benefit is faced with the option of pledging loyalty or foregoing the benefit. In this context, even the withholding of a gratuity is "tantamount to coerced belief." *Elrod*, 427 U.S. at 355 (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

Whatever constitutional safety net may be provided in other contexts by allowing government-funded grantees to create privately funded affiliates, the possibility of affiliation does not work in this context. In three significant cases, this Court has

examined the constitutional limits of conditioning government financial benefits upon the waiver of First Amendment rights and explored the possibilities of an affiliation solution. In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), a non-profit entity challenged a provision that prohibited 501(c)(3) organizations from engaging in "substantial lobbying." *Id.* at 541-42. Even though it is well recognized that lobbying is protected by the First Amendment, *see United States v. Harriss*, 347 U.S. 612, 625-26 (1954); *United States v. Rumley*, 345 U.S. 41, 46 (1953), the Court upheld the tax measure largely upon the ground that the entity could create a separate affiliate under 26 U.S.C. § 501 (c)(4) to engage in lobbying and, therefore, the restriction did not significantly burden First Amendment rights.

In *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), the Court found impermissible a provision of the Public Broadcasting Act that prohibited stations receiving federal funds from taking editorial positions and "from using even wholly private funds to finance its editorial activity." *Id.* at 400. In doing so, the Court observed that the provision would have been valid if, as in *Regan*, the stations remained free to establish affiliate organizations to take editorial positions with non-federal funds. *Id.*

In *Rust v. Sullivan*, *supra*, the Court reviewed a federal regulation that pertained to the funding of "family planning" programs that focused on pre-conception services relating to birth control and preventing unwanted pregnancies. *See* 500 U.S. at 178. Because post-conception and prenatal services were beyond the scope of the program, the

regulations at issue in that case prohibited the use of federal funds to provide abortion counseling. *See id.* at 178-79. The Court upheld the prohibition in the face of a First Amendment claim that the condition limited the capacity of physicians to counsel patients regarding the availability of abortion. *Rust* is best understood as a case in which abortion counseling was beyond the scope of the funded program. Nevertheless, in rejecting the First Amendment argument advanced in that case, the *Rust* Court observed, as in *Regan*, that the recipients of funding remained free to engage in "abortion-related speech" with private money in programs that remain "separate and distinct" from the federal program. *Id.*at 196.

The principle that emerges from *Regan*, *League of Women Voters*, and *Rust* is that conditions limiting free speech in a government-funded program are generally unconstitutional unless, at a minimum, they allow ample opportunities for the grant recipients to speak with private funding or through affiliated organizations.[5] Here, providing alternative opportunities to speak through an affiliated organization will not cure the constitutional injury created by the Anti-Prostitution Pledge. That is because the constitutional injury in this case does not flow only from what grantees are prohibited from saying in a government-funded program, but also from what they are required to affirm to participate in that program. There may be circumstances in

---

[5] Of course, where the requirements necessary to create an affiliate are unduly burdensome and impractical, the affiliate regime cannot cure the constitutional injury. *See* Resp. Br. at 52-58.

which compelled silence in one context can be made up for by permitted speech in another context. A compelled affirmation of belief, however, binds an organization until it is repudiated, which can only be done at the cost of disqualification from the federal program. It also compromises the ideological integrity of recipient organizations. The creation of an affiliated entity does not solve this constitutional problem.

C. This Is Not A Case About Government Speech

The Anti-Prostitution Pledge cannot plausibly be described as government speech because it involves an ideological commitment demanded *by* the government and delivered *to* the government without any requirement that the grantees disseminate it more broadly. Pet. Br. at 27 ("Section 7631(f) only requires recipients to have such a policy; it does not require them to actively disseminate that policy to foreign nationals.").

The content of the Pledge also belies any claim that it is communicating a government message. By signing the Pledge, a grantee merely affirms the grantee's own opposition to prostitution. Pet. Br. at 22. Accordingly, those who sign the Pledge are not converted into the government's messenger by that fact alone. The government does not claim otherwise. Indeed, the government candidly acknowledges that "only some recipients will actively convey [the government's] message [on prostitution] by implementing federally funded projects aimed at reducing the commercial sex trade." *Id.* at 27. Respondents are not among those grantees that have

been enlisted to covey the government's message. *See Rosenberger*, 515 U.S. at 833.

Furthermore, Respondents are ultimately responsible for the position that they must take as a result of the Anti-Prostitution Pledge, including the damage to their credibility and the diminished effectiveness of the program. The United States does not view the NGOs as its agents and does not accept responsibility for their speech or conduct. *See Rosenberger*, 515 U.S. at 835 (holding that student groups are not government speakers where the University has declared that the groups are not its agents, not subject to its control, and not its responsibility). It cannot claim a sliver of the NGOs' ideology as its own when it suits its agenda.

Finally, the government's contention that the Anti-Prostitution Pledge is necessary to ensure the "consistency, force, and scope," *id.* at 28, of the anti-prostitution message that the government itself is attempting to convey through its Leadership Act programs is both fatally overinclusive and under-inclusive. It is overinclusive because it applies to grant recipients who "[do] not promote prostitution . . with non-federal funds," *id.* at 27, and thus do not pose a risk of garbling the government's message. It is underinclusive because, as noted above, *see* p. 2, *supra*, major grant recipients are excluded from the Pledge requirement. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999) (broadcast ban on casino advertising "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("the facial underinclusiveness of [Florida's rape shield law]

raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests [that Florida] invokes" in its support").

In applying the government speech doctrine, some courts have asked "whether a reasonable and fully informed observer would understand the expression to be government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring in the judgment); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life of Illinois, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008). Here, "a reasonable and fully informed observer," aware of the circumstances, would understand that grantees who sign an Anti-Prostitution Pledge are not speaking for the government, and that the Anti-Prostitution Pledge is not "meant to convey and [does not have] the effect of conveying a government message." *Summum*, 555 U.S. at 472.[6]

This fact-specific inquiry avoids turning "free speech doctrine into a jurisprudence of labels." *Summum*, 555 U.S. at 484 (Breyer, J., concurring). It thus advances the purpose of the government speech doctrine while ensuring "political safeguards . . . adequate to set [government speech] apart from private messages." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 563 (2005). There is no doubt that "[t]o

---

[6] This Court has adopted a similar approach in distinguishing "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercises Clauses protect." *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., opinion) (emphasis in original).

govern, the government has to say something." *Id.* at 574 (Souter, J., dissenting). But it is equally clear that the line between government speech and private speech must be carefully policed.

On the one hand, political accountability is not possible if the government is allowed to "behave like puppet masters who create the illusion that [citizens] are engaging in personal expression when in fact the [government] is pulling its strings." *Nurre v. Whitehead*, 130 S. Ct. 1937, 1939 (2010) (Alito, J., dissenting from denial of certiorari). On the other hand, allowing the government to claim private speech as government speech permits an end run around fundamental First Amendment principles that otherwise prohibit the government from compelling individuals or organizations from adopting the government's beliefs as its own. *Johanns*, 544 U.S. at 568 ("The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them . . . .") (Thomas, J., concurring). This case presents the latter situation.

Petitioners' argument that the government speech doctrine applies to the Anti-Prostitution Pledge would eviscerate any "political safeguards" to the government speech doctrine. *Johanns*, 544 U.S. at 563. It would allow the government to spend some small amount of money to buy any volume of speech in the government's favor. If the government's view of the government speech doctrine were to prevail, it could require that every entity receiving any amount of public funds—NGOs, schools, hospitals—declare its wholesale support for all policies of the incumbent

government. The political landscape would then look dramatically different to the reasonable observer. The First Amendment does not tolerate such distortions in the marketplace of ideas.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

Arthur N. Eisenberg
Counsel of Record
Mariko Hirose
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3300
aeisenberg@nyclu.org

Steven R. Shapiro
Mie Lewis
Lenora M. Lapidus
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Dated: April 2, 2013